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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

MICHELLE AFONT, Plaintiff and Appellant, v. ALASKA AIRLINES, INC., Defendant and Respondent.	B260719 (Los Angeles County Super. Ct. No. BC521525)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michelle R. Rosenblatt, Judge. Affirmed.

Shewry & Saldaña, Christopher Saldaña for Plaintiff and Appellant.

Davis Wright Tremaine, Camilo Echavarria, Rochelle L. Wilcox and Aaron N. Colby for Defendant and Respondent.

* * * * * *

Two flight attendant trainees who had become friends got into a disagreement over a swapped work shift. The attendant who ended up on the better side of the swap nevertheless quit and sued her fellow trainee and the airline for whom they both worked for, among other things, harassment based on race, gender and age, and for wrongful termination. The trial court granted summary judgment to the airline. The flight attendant appeals, arguing that the court's ruling was wrong and that the court should not have awarded costs without finding that her lawsuit was "objectively without foundation." We conclude that the trial court properly granted summary judgment, and that the court's failure to make the requisite finding is harmless because her lawsuit is "objectively without foundation" as a matter of law. We accordingly affirm.

FACTS AND PROCEDURAL HISTORY

I. Facts

In the summer of 2012, Michelle Afont (plaintiff), a White woman in her early 50s, and Kenneth Smith (Smith), a Black man in his 40s, started working together as trainee flight attendants for defendant Alaska Airlines, Inc. (the Airline). Although both were assigned to LAX as their "base" airport, they never worked on the same flights, and only occasionally saw each other during layovers at various airports. The two nevertheless became fast friends and regularly exchanged text messages. These messages reveal that they had pet names for each other (Smith called plaintiff "Michelley," and plaintiff called Smith "sweet thing"), and sometimes sent each other heart emojis; plaintiff labeled her relationship with Smith as an "amazing lifetime friendship."

Their friendship rapidly unraveled in December 2012. Trainees are allowed to negotiate with each other to swap work shifts. On December 5, 2012, plaintiff told Smith she wanted to swap her December 28 shift and was willing pay whoever took it an extra $75 for the swap. She specifically asked Smith, "Interested? I can take one of your days, [a]nd pay you [$]75!" Smith told her he really wanted New Year's Day off. After plaintiff assured Smith that she was "9999 percent sure" that the Airline's scheduling rules precluded the Airline from assigning him to work on New Year's Day if he

worked her shift on December 28, Smith agreed to work her shift and gave her the code needed to effectuate the swap on the Airline's computer system.

As it turns out, plaintiff was wrong, and the Airline scheduled Smith to work on New Year's Day. Plaintiff did the swap anyway.[1] Smith asked her to rescind the swap, and she refused. A few days later, Smith texted her, "You should have respected me enough to at least be honest about everything. That doesn't sit well with me at all . . . real talk." Plaintiff persisted in her refusal to rescind, telling Smith to "check the timeline." On December 21, Smith responded, "And you should check your honesty . . . Check this out, you are and you still got it twisted. Now, people are already not feeling you (great start) and I'm REALLY not feeling you. Get that $75 to me to avoid problems . . . "

Perceiving Smith's final text message as a "threat," plaintiff called her supervisor at the Airline and told her she had been bullied and harassed by a Black male trainee, but refused to identify him. Even though the next day was a Saturday, one of the Airline's human resources officials called plaintiff the next day. The official told plaintiff that the Airline would immediately investigate her complaint, but reminded her that she was still scheduled to work the next three days (December 23, 24, and 25) and assured her that she would not be flying with any male flight attendants during those shifts.

A few hours later, plaintiff resigned from the Airline, in violation of the Airline's policy requiring 14 days' advance notice. After the holidays, plaintiff asked to be reinstated; her requested was denied.

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[1] Plaintiff asserts in a declaration opposing summary judgment that she did the swap *before* the schedules came out, but this assertion is inconsistent both with her earlier deposition testimony and with the timestamps on the text messages. We consequently disregard the statement in her declaration. (*Archdale v. American Internat. Specialty Lines Ins. Co.* (2007) 154 Cal.App.4th 449, 473 (*Archdale*) [courts "should" "disregard[]" "a party's self-serving declarations" when they contradict her earlier "discovery admissions"].)

II. Procedural Background

Plaintiff sued the Airline for "no less than" $1 million in compensatory damages, for punitive damages, and for declaratory and injunctive relief.[2] Specifically, she alleged claims for (1) race-based, sex-based, and age-based discrimination, harassment, retaliation and failure to protect her from the same, all under the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.); (2) wrongful termination in violation of public policy; (3) violations of the Ralph Civil Rights Act (Civ. Code, § 51.7) and the Bane Civil Rights Act (Civ. Code, § 52.1); (4) gender violence (Civ. Code, § 52.4); (5) negligent hiring; and (6) declaratory relief. Plaintiff voluntarily dismissed her gender violence and negligent hiring claims.

The Airline moved for summary judgment on plaintiff's remaining claims.

Plaintiff opposed the motion.

Although plaintiff had never seen Smith be violent with anyone or even raise his voice, she maintained that Smith's December 21 text message was a threat because (1) he demanded $75 "to avoid problems"; (2) he once told her that she "didn't know the real Ken," and she found a picture of him on his Facebook page in which he was at a sports game but not smiling; (3) he was once "cling[y]" and "possessive[]" of her during a trainee exercise in August 2012 when his task was to push her around in a wheelchair; (4) plaintiff's husband opined that *he* "considered" Smith's text "to be harassing and threatening"; and (5) Smith had exhibited a tendency toward violence with others because (a) another trainee reported on January 17, 2013, that Smith became "hostile/angry when confronted about service or safety issues"; (b) another trainee reported on January 25, 2013, that Smith was "quiet," "distant," "grumpy and unapproachable," and "odd and unnerving" during a flight; and (c) Smith himself complained that his supervisor was unavailable for him, possibly because "he may feel threatened by me as a straight, black male[]."

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[2] Plaintiff also sued Smith. The trial court granted summary judgment to Smith, and plaintiff does not appeal that ruling.

Although plaintiff testified during her deposition that Smith had never treated her inappropriately or made sexual advances toward her, she maintained that Smith's last text message was race-, sex- and age-based (1) due to the language in the message; (2) due to her "belief" and "life experiences"; (3) because he once asked her to have a drink while they were at the same hotel during a layover; and (4) because he made "inappropriate comments" about women—namely, that he would sometimes compliment plaintiff by saying she looked "really good" and called one woman "super hot" and another "so fine."

The trial court granted the Airline's motion for summary judgment in an eight-page written order. The court began by sustaining 21 of the Airline's 25 objections to plaintiff's evidence. The court rejected plaintiff's FEHA claims on two grounds: (1) "the evidence does not demonstrate that the disagreement and text messages between plaintiff and Smith were related to plaintiff's race, age or gender"; and (2) plaintiff resigned "before any further harassment" could happen and "before any investigation could have been conducted." The court rejected plaintiff's wrongful termination claim because plaintiff voluntarily quit and because "Smith's conduct did not rise to the level of creating an intolerable working condition" amounting to a constructive discharge. The court rejected plaintiff's "violence-based causes of action" because "the evidence [was] insufficient to raise a triable issue of material fact as to whether Smith threatened physical violence in his text messages," and rejected plaintiff's declaratory relief claim as derivative of the others it had rejected.

The trial court subsequently entered judgment for the Airline, and found it to be a "prevailing party" entitled to recover its costs under Code of Civil Procedure section 1032, subdivision (b).

Plaintiff filed a timely notice of appeal, and the trial court subsequently fixed the cost award at $4,203.50.

DISCUSSION

Plaintiff makes three arguments on appeal: (1) the trial court erred in granting summary judgment on her FEHA-based harassment claim because there is a triable issue as to Smith's motive once improperly excluded evidence is considered; (2) the trial court erred in granting summary

judgment on her wrongful termination claim because there is a triable issue as to whether her working conditions were intolerable; and (3) the trial court erred in awarding costs without first finding that her lawsuit was "objectively without foundation," as *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 115 (*Williams*) now requires.

I. Summary Judgment

Summary judgment is appropriate when a party can "show that there is no triable issue as to any material fact and that [it] is entitled to judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) The party moving for summary judgment must show either that the opposing party cannot establish "[o]ne or more elements of [her] cause of action" or by showing a valid affirmative defense. (*Id.*, subds. (o) & (p)(2).) If the moving party (usually the defendant) meets this initial showing, the burden shifts to the other party (usually the plaintiff) to present evidence showing that a triable issue of material fact exists. (*Rodriguez v. E.M.E., Inc.* (2016) 246 Cal.App.4th 1027, 1032.) "A triable issue of material fact exists if, and only if, the evidence reasonably permits the trier of fact to find the contested fact in favor of the plaintiff in accordance with the applicable standard of proof." (*Rondon v. Hennessy Industries, Inc.* (2016) 247 Cal.App.4th 1367, 1374.) We review a trial court's grant of summary judgment de novo. (*Burgueno v. Regents of University of California* (2015) 243 Cal.App.4th 1052, 1057.)

A. FEHA-Based Harassment Claim

Because, in reviewing a motion for summary judgment, we consider only the evidence the trial court considered unless the court erred in its evidentiary rulings (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 526-527 (*Reid*)), we will first analyze plaintiff's challenges to the court's evidentiary rulings and then turn to the court's summary judgment ruling.

1. Evidentiary rulings

Plaintiff attacks 19 of the trial court's evidentiary rulings against her in a chart that does not explain what evidence was excluded, does not cite to the record on appeal, does not cite any legal authority whatsoever in attacking 11 of the rulings, and cites the same four provisions of the Evidence Code in attacking the remaining eight rulings, two of which are nonexistent (namely, Evidence Code sections 1263 and 1265). This is woefully inadequate

and violates several provisions of the California Rules of Court. (Cal. Rules of Court, rule 8.204(a)(1)(B) [requiring each point on appeal to be supported by argument and authority] & (a)(1)(C) [requiring citations to the record].) Given these deficiencies, we may treat all of her evidentiary challenges as waived. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) However, in order not to punish plaintiff for her attorney's intransigence, we will nevertheless evaluate the merits of the eight challenges for which she supplies some legal authority.

Although our Supreme Court has yet to decide whether evidentiary rulings attendant to a summary judgment motion are to be reviewed de novo (like summary judgment motions themselves) or instead are to be reviewed for an abuse of discretion (like evidentiary rulings) (*Reid*, *supra*, 50 Cal.4th at p. 535), we need not weigh in on this dispute because we independently conclude that the trial court correctly sustained the eight objections plaintiff intelligibly assails on appeal. Plaintiff's arguments fall into three general categories.

First, plaintiff contends that the trial court erred in excluding from evidence several documents produced by the Airline during discovery—namely, (1) the two reports from other trainees regarding Smith's demeanor, (2) Smith's e-mail setting forth his speculation that his supervisor was avoiding him because the supervisor "may feel threatened by me as a straight, black male[]," and (3) four different, unattributed reports evaluating Smith's performance as a trainee. The trial court excluded these items for lack of authentication and/or because they were hearsay. Plaintiff asserts that the Airline's production of these documents is sufficient, by itself, to authenticate them and to fit them within the "business records" exception to the hearsay rule (Evid. Code, §§ 1270-1272). She is wrong. Although the Airline's act of producing the documents authenticates them as documents that the Airline possessed and disclosed, it does not establish (1) that they are the personnel and business records that they purport to be—that is, that they accurately reflect what it is that they purport to record (Evid. Code, § 1401; *Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 855 [so noting]); (2) that they satisfy the four requirements necessary to fit within the "business records" exception to the hearsay rule (Evid. Code, § 1271;

People v. Townsel (2016) 63 Cal.4th 25, 52); or (3) that the content of the documents is admissible because the documents contain multiple layers of hearsay, and "[m]ultiple hearsay may not be admitted unless there is an exception for each level" (*People v. Sanchez* (2016) 63 Cal.4th 665, 675).

Second, plaintiff argues that the trial court erred in excluding her opinion that one of the Airline's regulations effectively required the Airline to suspend Smith "pending an[y] investigation regarding [her] claim of harassment." The regulation actually provides that an "employee might be withheld from service" for "harassment." Because a person's testimony about the meaning and legal effect of a writing is an improper lay opinion (e.g., *Morrow v. Los Angeles Unified School Dist.* (2007) 149 Cal.App.4th 1424, 1444-1445), the court correctly excluded plaintiff's opinion.

Lastly, plaintiff argues that the trial court erred in excluding the portions of her declaration in which she summarized some of the documents produced by the Airline. Because those portions are merely repeating out-of-court statements, they were properly excluded as hearsay. (Evid. Code, § 1200 et seq.)

2. Merits

Among other things, FEHA makes it unlawful "[f]or an employer . . . to harass an employee" "because of race," "sex," or "age." (Gov. Code, § 12940, subd. (j)(1).) To prevail on this claim, a plaintiff-employee must establish that "'(1) [she] belongs to a protected group; (2) [she] was subject to unwelcome [racial, sexual or age-based] harassment; (3) the harassment complained of was based on [her race, sex or age]; [and] (4) the harassment complained of was sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.' [Citation.]" (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1377.)

The trial court ruled that there was no triable issue as to the third element, finding that "the evidence does not demonstrate that the disagreement and text messages between plaintiff and Smith were related to plaintiff's race, age or gender."

Plaintiff argues that the trial court's ruling was incorrect because three pieces of evidence create a triable issue of fact on the issue of Smith's motive.

First, she points to her own suspicions—based on the words in the text message, her "belief" and her "life experiences." The text messages themselves in no way refer to plaintiff's race, her sex, or her age. And plaintiff's testimony about Smith's unexpressed motive is by definition speculative and hence inadmissible. (*Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 582 [testimony "regarding the state of mind of another person" is inadmissible "speculation"]; *People v. Lamer* (2003) 110 Cal.App.4th 1463, 1470 [same].)

Second, plaintiff notes that Smith submitted a declaration explaining how his text messages expressed frustration but no intent to threaten, and goes on to argue that the trial court should have exercised its discretion under Code of Civil Procedure section 437c, subdivision (e), to disbelieve that declaration and to deny summary judgment. To be sure, that statute imbues a trial court with discretion to deny summary judgment "if a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." (Code Civ. Proc., § 437c, subd. (e); accord, *Spinner v. American Broadcasting Companies, Inc.* (2013) 215 Cal.App.4th 172, 183-184.) However, the trial court did not abuse its discretion in declining not to exercise that discretion in this case because Smith's declaration indicating that his intent was to express frustration over how plaintiff mistreated him in a schedule swap is corroborated by contemporaneous text messages detailing that mistreatment.

Third, plaintiff points to the evidence regarding Smith's conduct toward others. Such "me too" evidence can be used to prove discriminatory intent. (*Pantoja v. Anton* (2011) 198 Cal.App.4th 87, 92, 113-114.) However, none of the "me too" evidence in this case raises a triable issue of material fact as to the racial, sexual, or age-based motivation of Smith's text messages. Plaintiff points to the reports of other trainees regarding Smith being "hostile/angry," "grumpy and unapproachable" and "odd and unnerving," but this evidence was properly excluded and does not in any event support a finding that this behavior is motivated by racial, sexual, or age-based animus. Plaintiff also notes Smith's occasional reference to other women as "super hot" or "so fine," his occasional compliment that plaintiff "look[s] really good," and his one-time offer to grab a drink, but these statements were all offered in plaintiff's

declaration opposing summary judgment and contradict her earlier deposition testimony that Smith never treated her inappropriately or made sexual advances toward her. They may therefore be disregarded (*Archdale*, *supra*, 154 Cal.App.4th at p. 473), and do not in any event evince any racial, sexual, or age-based motivation for Smith's text messages.

In sum, plaintiff offered no evidence of Smith's discriminatory motive, which defeats her FEHA-based harassment claim against the Airline as a matter of law. For this reason, we need not reach plaintiff's arguments that there are triable issues of fact as to other elements of this claim.

B. Wrongful Termination Claim

To prevail on a claim of wrongful termination in violation of public policy, the plaintiff-employee must prove "'(1) an employer-employee relationship, (2) the employer terminated the plaintiff's employment, (3) the termination was substantially motivated by a violation of public policy, and (4) the discharge caused the plaintiff harm.' [Citation.]" (*Nosal-Tabor v. Sharp Chula Vista Medical Center* (2015) 239 Cal.App.4th 1224, 1234-1235.) A plaintiff can bring a claim for wrongful discharge even if she resigns, if her resignation amounts to a constructive discharge. (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 826.) This occurs when the resignation is "*employer*-coerced, [and] not caused by the voluntary action of the employee or by conditions . . . beyond the employer's reasonable control." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1248 (*Turner*).) A resignation is "employer-coerced" only if the "employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Id.* at p. 1251; accord, *Vasquez*, at p. 826.) "'[S]ingle, trivial, or isolated acts'" are generally not sufficient to support a finding of constructive discharge. (*Turner*, at p. 1247; *Valdez v. City of Los Angeles* (1991) 231 Cal.App.3d 1043, 1056.) Although the question whether conditions were so intolerable as to amount to a constructive discharge is usually one of fact, summary judgment may be appropriate where the plaintiff-employee's decision to resign is unreasonable

as a matter of law. (*Vasquez*, at p. 827; *Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1022.)

The trial court correctly concluded that plaintiff's decision to resign was unreasonable as a matter of law because "Smith's conduct did not rise to the level of creating an intolerable working condition." The Airline had no time to create "intolerable or aggravated" working conditions because plaintiff resigned on a Saturday night, less than 36 hours after first informing any Airline personnel about Smith's December 21 text message and mere hours after the Airline's human resources official informed her that the Airline would be conducting an investigation.

On appeal, plaintiff contends that the Airline made her working conditions intolerable because the Airline did not give her the next three days off (over the holiday season) and, instead, forced her to choose between resigning or facing the possibility of flying in the same plane as Smith, the man she believed had threatened her. Even if we ignore the precedent indicating that a single incident is rarely, if ever, enough to create intolerable working conditions (*Turner*, *supra*, 7 Cal.4th at p. 1247), plaintiff was never put to the choice she portrays on appeal. Although the human resources official told plaintiff she had to work her upcoming shift or resign, there is no evidence to support her assertion that she might be scheduled to fly with Smith. Plaintiff had never once flown with Smith in the months they were both trainees, and the Airline's human resources official assured plaintiff that she was not scheduled to fly with *any* male flight attendants during her upcoming shifts. Plaintiff's insistence that there was still a possibility that Smith might be substituted onto one of her flights at the last minute was based on nothing but her own conjecture, and the trial court properly gave it no weight. (E.g., *Joseph E. Di Loreto, Inc. v. O'Neill* (1991) 1 Cal.App.4th 149, 161 [evidence to oppose summary judgment "must be reasonably deducible from the evidence, and not . . . derived from speculation, conjecture, imagination, or guesswork"].)

In sum, plaintiff did not adduce evidence to support a triable issue as to whether she was constructively discharged, which defeats her wrongful termination claim as a matter of law.

II. Cost Award

As a general matter, the "prevailing party" in a civil suit "is entitled" to recover its costs "as a matter of right." (Code Civ. Proc., § 1032, subd. (b).) However, our Supreme Court recently held that, under FEHA, a prevailing defendant such as the Airline is only entitled to its costs if "the court finds the [plaintiff's] action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." (*Williams*, *supra*, 61 Cal.4th at p. 115; Gov. Code, § 12965, subd. (b).)

Plaintiff argues that the trial court erred in awarding the Airline its costs because the court never made a finding that plaintiff's lawsuit was "objectively without foundation." Although we review cost awards for an abuse of discretion (*Charton v. Harkey* (2016) 247 Cal.App.4th 730, 739), a trial court abuses its discretion when it "applies the wrong legal standard" (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733).

As a threshold matter, the Airline argues that the issue of costs is not properly before us because plaintiff never filed a separate notice of appeal as to the court's April 2015 order awarding costs. This is true, but irrelevant. "[W]hen a judgment awards costs . . . to a prevailing party and provides for the later determination of the amount[], [a] notice of appeal [as to the judgment] subsumes any later order setting the amount[] of the award." (*Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 998; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1316-1317; cf. *Fish v. Guevara* (1993) 12 Cal.App.4th 142, 147 [earlier notice of appeal does not reach fees order when original judgment did not adjudicate entitlement to those fees].) Because the judgment in this case "adjudicated" and "ordered" plaintiff to pay the Airline's "costs" (and cited Code of Civil Procedure section 1032, subdivision (b) as the basis for that ruling), plaintiff's notice of appeal challenging the judgment subsumes the court's subsequent order fixing the amount of those costs.

We agree with plaintiff that the trial court erred, albeit through no fault of its own. At the time the court issued its cost award, the Courts of Appeal were split as to whether to apply Code of Civil Procedure section 1032, subdivision (b) in FEHA cases. (*Williams*, *supra*, 61 Cal.4th at pp. 102-104.) A month later, our Supreme Court decided *Williams* and held that

FEHA's standard governed. Because the trial court's decision employed the Code of Civil Procedure section 1032 standard, its award is incorrect.

However, we need not remand to the trial court for an evaluation of whether plaintiff's lawsuit was "objectively without foundation" because we conclude that a finding to the contrary cannot reasonably be made from the record. (*Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 869.) As explained above, by the time of the summary judgment motion, there was absolutely no admissible evidence that Smith acted with a discriminatory motive or that plaintiff faced any possibility of working with Smith during her upcoming three-day shift (thereby precluding a finding that she was compelled by the Airline to resign to avoid working with Smith). Plaintiff voluntarily abandoned her other eight claims. On this record, a cost award is warranted even under *Williams'*s more onerous standard.

DISPOSITION

The judgment is affirmed. The Airline is entitled to its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ